

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>90-10115</u>
FRANKIE DIANE SPIRES)	
)	
Debtor)	
_____))	
)	
FRANKIE DIANE SPIRES)	FILED
)	at 3 O'clock & 44 min. P.M.
Plaintiff)	Date: 2-21-91
)	
vs.)	Adversary Proceeding
)	Number <u>90-1078</u>
GRACEWOOD FEDERAL CREDIT UNION)	
)	
Defendant)	

MEMORANDUM AND ORDER

Trial was held on the complaint filed by Ms. Frankie Diane Spires, debtor in the underlying Chapter 13 proceeding (hereinafter "debtor") against Gracewood Federal Credit Union (hereinafter "Gracewood"). Debtor alleges a violation of the codebtor stay provisions of 11 U.S.C. §1301 and asserts a claim for damages and equitable relief arising from this violation. Based upon the evidence presented at trial I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

The debtor filed her voluntary petition under Chapter 13 of the Bankruptcy Code on January 23, 1990. At the time of filing, the debtor was

obligated to Gracewood on a consumer loan and Ms. Della Mae Jones was a codebtor on the obligation. Gracewood was listed as a creditor in the underlying Chapter 13 proceeding and received notice of the bankruptcy filing. Gracewood filed a claim in the amount of Three Hundred Fifty-Six and 50/100 (\$356.50) Dollars which claim was allowed as unsecured. On August 30, 1990, Gracewood, acting through one of its employees contacted the codebtor by telephone and advised the codebtor of the delinquent status of the debtor and codebtor's loan with Gracewood. In response to the contact by Gracewood, the codebtor immediately contacted the debtor and threatened to kill her unless the debtor immediately paid off the Gracewood debt.

CONCLUSIONS OF LAW

The complaint alleges a violation of the codebtor stay provided under 11 U.S.C. §1301(a).¹ As part of the debtor's

complaint she seeks an award of attorney's fees², punitive damages, an order

¹11 U.S.C. §1301(a) provides in pertinent part:

- (a) Except as provided in subsection (b) and (c) of this subsection, after the order for relief under this Chapter, a creditor may not act . . . to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor or that secured such debt, unless
 - (1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or
 - (2) the case is closed, dismissed or converted to a case under Chapter 7 or 11 of this title.

²At hearing debtor's counsel itemized his time spent in the preparation and prosecution of this adversary proceeding as

- 1 hour - preparing the adversary proceeding for filing
- 1 hour - attending deposition
- 1 hour - preparing for trial
- 1 hour - in trial of this case.

declaring the right of Gracewood to collect the underlying debt from the codebtor to be forfeit due to Gracewood's unlawful conduct, and such additional relief as this court deems proper. Gracewood argues that it did not violate the codebtor stay of §1301 in that in its contact with the codebtor it did not demand payment. The facts presented simply do not support this contention. The actions of Gracewood in this case placed pressure upon the codebtor and indirectly resulted in pressure being placed upon the debtor to pay. The purpose of the codebtor stay of 1301 is to enable a consumer debtor to propose and execute a plan of repayment without undue pressure to afford a preference to debts involving cosigners. Harris v. Fort Oglethorpe State Bank, 721 F.2d 1052, 1053 (6th Cir. 1983). The legislative history of §1301 is clear on that point.

This section [1301] . . . is designed to protect a debtor operating under a Chapter 13 individual repayment plan by insulating him from indirect pressures from his creditors exerted through friends or relatives who may have cosigned an

obligation of the debtor.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. at 426 (1977).

Reason and common sense demands a finding that the purpose of the telephone contact by Gracewood with the codebtor was to apply indirect pressure upon the debtor to extract payment. I find that this communication constituted a violation of 11 U.S.C. §362(a)(6) which prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title".

Bankruptcy Code §362(h)³ provides for the recovery of damages, costs, attorneys fees, and in the appropriate case, punitive damages by an individual

³11 U.S.C. §362(h) provides:

(h) An individual injured by any willful violation of a stay, provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

damaged by a willful violation of the stay of §362(a). Section 362(h) mandates an imposition of sanctions for a willful violation of the stay. An award of damages under this section is analogous to a finding of contempt. Sarah Singleton v. South Carolina Student Loan Corp. (In re: Singleton) Adv. Pro. #90-4145 (Bankr. S.D. Ga. slip op. December 4, 1990; Davis, C.J.). Damages are not recoverable in the event the stay

violation is inadvertent or technical; however, if the violation is willful or knowing the imposition of damages is appropriate. See, In re: La Tempa, 58 B.R. 538 (Bankr. W.D. Va. 1986). To support the imposition of damages for a violation of the automatic stay, the defendant must be shown to have had notice or knowledge sufficient to be aware of the prescribed conduct. Id.

In this case, Gracewood admits knowledge of the pending Chapter 13 proceeding at the time of the contact with the codebtor. Moreover, Gracewood is a sophisticated institutional lender and should be well aware of the ramifications of its conduct. In re: Singleton, supra. Gracewood had actual knowledge that the Chapter 13 proceeding was pending and with that knowledge proceeded to contact the codebtor to exert indirect pressure on the debtor for payment of the debt. Accord, In re: Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985). Having determined a willful violation of the automatic stay, this court is required pursuant to 362(h) to award actual damages and attorneys fees. By using the words "shall recover" Congress intended that the award of actual damages, costs and attorneys fees is mandatory and is not within the discretion of the court. In re: Inslaw, Inc. 83 B.R. 89, 165 (Bankr. D.D.C. 1988).

A 'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional.

Whether the party believes in good faith that it had a right to the property is not relevant

to whether the act was 'willful' or whether compensation must be awarded.

In re: Bloom, 875 F.2d 224, 227 (9th Cir. 1989), quoting from Inslaw, Inc. v. United States (In re: Inslaw, Inc.), 83 B.R. 89, 165 (Bankr. D.D.C. 1988). See also In re: Mewes, 58 B.R. 124, 128 (Bankr. D.S.D. 1986); In re: Bragg, 56 B.R. 46, 49 (Bankr. S.D. Ala. 1985); In re: Tel-A-Communications Consultants Inc., 50 B.R. 250, 254 (Bankr. D. Conn. 1985).

Punitive damages are an extraordinary remedy designed to punish and deter particularly egregious conduct. Stevens v. South Atlantic Cannery Inc., 848 F.2d 484 (4th Cir. 1988), cert. denied, 488 U.S. 996, 109 S.Ct. 564, 102 L.ed. 589 (1988). .A finding that a creditor's actions were intentional standing alone does not give rise to an award of punitive damages. It is necessary that defendant's actions be "a deliberate violation". In re: Coates, 108 B.R. 823 (Bankr. M.D. Ga. 1989). Punitive damages are not intended to compensate victims, but rather are private fines, awarded in addition to what is necessary to compensate the victim. Carver v. Carver, et al, (In re: Carver), Ch. 13 case No. 89-10203, adv. case No. 89-1043 (Bankr. S.D. Ga. Aug. Div. Dalis, J. Dec. 28, 1990). This court is persuaded by defendant's testimony that their actions were not a deliberate violation of the automatic and codebtor stays of the Bankruptcy Code. An award of punitive damages is not warranted.

From the evidence presented I am convinced that the debtor took the threat made by the codebtor seriously and compensatory damages are recoverable against Gracewood as a result of the emotional injury suffered by the debtor directly attributable to the codebtor stay violation initiated by Gracewood. Compensatory damages in the amount of One Thousand and No/100 (\$1000.00) Dollars are appropriate. As a portion of compensatory damages, §362(h) also provides for the

recovery of attorneys fees. Reasonable attorneys fees in the amount of Five Hundred and No/100 (\$500.00) Dollars are awarded as an additional component of the compensatory damage award.

In addition to an award of damages, the debtor requests a judgment declaring that the right of Gracewood to collect the underlying debt from the codebtor is forfeit by reason of Gracewood's action. This court cannot order such an impairment of the rights of Gracewood as the debtor's plan cannot extend a codebtor protection beyond the limited protection provided in the Bankruptcy Code. See In re: Britts, 18 B.R. 203 (Bankr. N.D. Ohio); In re: Rolland, 20 B.R. 931 (Bankr. W.D. N.Y. 1982).

The debtor has also prayed for generic "other relief". In this case I deem it proper to specifically order injunctive relief.

ORDER AND JUDGMENT

Pursuant to the foregoing findings of fact and conclusions of law, it is the order of this court that Gracewood Federal Credit Union be and is hereby permanently enjoined from any further direct or indirect contact with the debtor, Frankie Diane Spires, or the codebtor, Della Mae Jones, in reference to the obligation owed to the Gracewood Federal Credit Union in the underlying Chapter 13 proceeding unless relief from the stay of 11 U.S.C. §362 and/or §1301 is hereafter granted.

Further ORDERED that judgment is entered for the debtor, Frankie Diane Spires, against Gracewood Federal Credit Union in the amount of One Thousand Five Hundred and No/100 (\$1,500.00) Dollars together with future interest as provided by law.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 21st day of February, 1991.